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duction of such evidence is unfairly prejudicial should the trial courts exercise their discretion and exclude it.

The confrontation clause has long been held not to bar the introduction of reliable hearsay.[224] Since the *Brown* court determined that under the rules of evidence declaration against penal interest testimony is sufficiently reliable so as to permit its use by a defendant, there appears to be no constitutional bar to permitting its use by the prosecution.

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Press held accountable in punitive damages for trespass

The first amendment's prohibition on abridging the freedom of the press[225] is grounded in the belief that a free society needs an

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97 (Harlan, J., concurring). Justice Marshall, joined by Justices Black, Douglas and Brennan, dissented. *Id.* at 100 (Marshall, J., dissenting). Justice Marshall believed that "[a]bsent the opportunity for cross-examination [of the declarant], testimony about [an] incriminating and implicating statement allegedly made by [an accomplice is] constitutionally inadmissible. . . ." *Id.* at 103 (Marshall, J., dissenting). Justice Marshall cited Bruton v. United States, 391 U.S. 123 (1968), as controlling. 400 U.S. at 103. *Bruton*, however, concerned use of inadmissible hearsay against the defendant which did not fall within any recognized hearsay exception. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 250 (Silverman, J.P., concurring); *see* note 215 *supra*. It appears, therefore, that *Bruton* is distinguishable from both *Dutton* and *Cepeda*.

The statutory rule at issue in *Dutton* contrasts with New York law which holds that although admissions by a co-conspirator in furtherance of conspiracy are admissible against all co-conspirators, admissions made after the culmination of the common plan are admissible only against the declarant. RICHARDSON, *supra* note 205, § 244, at 214-15. *See also* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972).

[224] *See* note 220 *supra*. This is the teaching of Dutton v. Evans, 400 U.S. 74 (1970), wherein the Court held that indicia of reliability were required for the introduction of incriminating hearsay testimony. *Id.* at 88-89. The Court noted that such indicia are present if: (1) the declarant's personal knowledge of the facts contained in the declaration is "abundantly established"; (2) there is little possibility that the statement is the product of a faulty recollection; (3) the circumstances indicate that the declarant has not misrepresented the involvement of the defendant; and (4) the statement appears spontaneous and against the penal interest of the declarant. *Id.* Whether the statement in *Dutton* was against the declarant's penal interest is questionable. Evans' codefendant made the declaration at issue upon his return to prison after his arraignment on a murder charge. *Id.* at 77. He was asked by a fellow inmate; " 'How did you make out in court?' " *Id.* The declarant responded: " 'If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now.' " *Id.* The self-incriminating aspect of this statement is unclear, as it appears likely that the declarant was attempting to shift the blame to Evans. One commentator has questioned the precedential value of *Dutton* in light of its plurality opinion. *See* Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

[225] The first amendment of the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The freedoms of the first amendment are protected from state action through the

informed public.[226] Recognizing that the right to publish presupposes the ability to collect information,[227] courts have acknowledged a limited first amendment right of the press to gather news.[228] While criminal or tortious acts committed in the news-gathering process are outside the protection of the first amendment,[229] the extent of

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fourteenth amendment. *E.g.*, Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[226] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). The Supreme Court has noted that the first amendment also protects the rights of individuals to receive information. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976); Procunier v. Martinez, 416 U.S. 396, 408-10 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

[227] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Herbert v. Lando, 568 F.2d 974, 977 (2d Cir.), *cert. denied*, 98 S. Ct. 1483 (1978); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 839 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505 (1974).

[228] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681 (1972). *See also* Pell v. Procunier, 417 U.S. 817, 833 (1974); KQED, Inc. v. Houchins, 546 F.2d 284, 285 (9th Cir. 1976), *rev'd*, 46 U.S.L.W. 4830 (June 26, 1978); Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969); Associated Press v. KVOS, 80 F.2d 575, 581 (9th Cir. 1935) (dictum), *rev'd on other grounds*, 299 U.S. 269 (1936); Forcade v. Knight, 416 F. Supp. 1025, 1031-34 (D.D.C. 1976); *In re* Mack, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting), *cert. denied*, 352 U.S. 1002 (1957).

Although the Court has recognized a right of access to information, this right does not encompass a privilege of "special access to information not available to the public generally." Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (dictum) (citations omitted); *cf.* Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (federal government can validly restrict travel by citizens to Cuba notwithstanding desire to learn about conditions therein). *Branzburg* involved three separate cases in which reporters were asked to disclose confidential sources and information to grand juries. The reporters refused to testify on first amendment grounds, contending that if they were compelled to reveal these confidences, their news-gathering abilities would be severely hampered. The plaintiffs contended that the result would be a restriction on the free flow of information to the public since confidential sources would be deterred from furnishing information to the press. 408 U.S. at 679-81. The Supreme Court rejected this argument, stating that the need to thoroughly pursue a criminal investigation and prosecution outweighed whatever effect the compulsion of grand jury testimony would have on the journalists' information-gathering activities. *Id.* at 690-91. The Court cautiously added, however, that if a grand jury investigation were conducted in other than good faith, first amendment issues would be raised. *Id.* at 707. Two years later, in Pell v. Procunier, 417 U.S. 817 (1974), the Court reaffirmed the position that the right to gather news confers no special privileges on the press. *Pell* involved a prison regulation which prohibited media interviews with specific inmates. Three journalists filed suit claiming that the regulation unconstitutionally inhibited the news-gathering activities of the press. Justice Stewart, writing for the majority, stated that the press was not entitled to a "constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834. He concluded that the government had no duty to make available to the press sources of information not generally available to the public. *Id.*

[229] *See, e.g.*, Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). In *Davis*, the

the press' liability for such actions has remained unclear.[230] Recently, in *Le Mistral, Inc. v. CBS,*[231] the Appellate Division, First Department, held that compensatory and punitive damages are properly assessable for a trespass committed in the course of news gathering.[232]

In *Le Mistral,* the defendant directed a reporter and camera crew to visit various restaurants that had been cited for health code violations. Following instructions that they were to catch the occupants by surprise,[233] the CBS employees entered the plaintiff's restaurant unannounced with cameras "rolling" and bright lights shining.[234] Although asked to leave by the owner of the restaurant, the crew remained on the premises long enough to cause a disruption

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defendant, an investigative reporter, made defamatory statements about the plaintiff to the plaintiff's business associates with the hope of evoking a newsworthy response. 510 F.2d at 733. In his appeal from an award granting the plaintiff compensatory and punitive damages, the defendant claimed that his statements were protected by the first amendment since they were made in private, prior to the publication of a story. *Id.* at 734. The court rejected this argument, stating that reporters may not utter statements in private that would, if published, lead to liability. *Id.*

In *Galella,* the plaintiff was a freelance photographer who persisted in his attempts to photograph Jacqueline Onassis and her children. His conduct went beyond ordinary news coverage and often placed the safety of Mrs. Onassis and her children in jeopardy. 487 F.2d at 992. In granting the injunctive relief requested by the Onassis family, the court found Galella guilty of harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of defendant's personality and invasion of privacy. *Id.* at 994. The Second Circuit considered Galella's contention that the first amendment protected his conduct while gathering items of general public interest and responded that "[c]rimes and torts committed in news gathering are not protected [by the first amendment] . . . . There is no threat to a free press in requiring its agents to act within the law." *Id.* at 995-96 (citations omitted).

In *Dietemann,* two reporters attempted to expose the plaintiff as a medical charlatan. 449 F.2d at 246. Posing as patients in need of medical care, they surreptitiously photographed the plaintiff's method of medical treatment and transmitted their conversation with him to a reporter and state law enforcement officials situated outside the doctor's home. *Id.* In plaintiff's suit against *Time* for invasion of his right to privacy, the Ninth Circuit rejected defendant's contention that the actions of their reporters were protected by the first amendment. The court stated that "[w]e agree that newsgathering is an integral part of news dissemination. . . . [However,] the First Amendment has never been construed to accord newsmen immunity from torts or crimes committted during the course of newsgathering. The First Amendment is not a license to trespass . . . ." *Id.* at 249.

[230] The dimensions of the public's right of access to information is, to a great extent, undefined. Note, *The Rights of the Public and the Press to Gather Information,* 87 HARV. L. REV. 1505, 1507 & n.16 (1974). Since the Supreme Court has interpreted the right of the press to gather information to be equivalent to that of the public generally, the extent of the press' rights also remain unclear. *See id.*

[231] 61 App. Div. 2d 491, 402 N.Y.S.2d 815 (1st Dep't 1978).

[232] *Id.* at 494-95, 402 N.Y.S.2d at 817-18.

[233] *Id.* at 493 n.1, 402 N.Y.S.2d at 816 n.1.

[234] *Id.* at 493, 402 N.Y.S.2d at 816.

in the restaurant's routine.[235] Plaintiff sued for trespass and, following a jury trial, was awarded compensatory and punitive damages.[236] The trial court set aside both awards, however, and ordered a new trial on the issue of damages.[237]

On appeal, the appellate division modified the judgment of the trial court, reinstating the compensatory damage award and remanding for a new trial on the punitive damage issue.[238] Justice Lupiano, writing for the majority,[239] rejected the argument advanced by CBS that notwithstanding its trespass,[240] the first amendment protected its news gathering from any damage award.[241] Reasoning that the exercise of the right of freedom of the press is tempered by the duty not to infringe upon the rights and liberties of others,[242] the court concluded that CBS could properly be held accountable for compensatory damages resulting from its wrongful conduct.[243] With respect to punitive damages, the court noted that the purpose of such awards is to punish the defendant, deter him from repeating his wrongful conduct and protect society from similar acts.[244] Stating that conduct evincing a wrongful motive or a reckless disregard of the plaintiff's rights would justify a punitive damage award,[245] the court remanded the issue for a new trial.[246]

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[235] *Id.* at 493 n.1, 402 N.Y.S.2d at 816 n.1.

[236] Plaintiff was awarded $1,200 in compensatory damages and $250,000 in punitive damages. *Id.* at 495, 402 N.Y.S.2d at 818.

[237] *Id.* at 493, 402 N.Y.S.2d at 816. The trial court set aside the damage awards because it had excluded testimony relevant to the defendant's motive and purpose in entering the restaurant. *Id.* at 495, 402 N.Y.S.2d at 818.

[238] *Id.*

[239] The majority consisted of Justices Lupiano, Lane, Markewich and Sandler. Presiding Justice Murphy dissented in part.

[240] The trial court observed that the CBS reporter tried to justify the intrusion by calling the restaurant a "place of public accomodation." The reporter admitted, however, that the crew did not enter the restaurant for the purpose of dining. 61 App. Div. 2d at 493 n.1, 402 N.Y.S.2d at 816 n.1.

[241] *Id.* at 493-94, 402 N.Y.S.2d at 817.

[242] *Id.* at 494, 402 N.Y.S.2d at 817. Justice Lupiano observed that "the First Amendment is not a shibboleth before which all other rights must succumb." *Id.*

[243] *Id.*

[244] *Id.* at 494-95, 402 N.Y.S.2d at 817. The notion of awarding damages as a punishment for civil wrongs is not without criticism. *See* Walker v. Sheldon, 10 N.Y.2d 401, 406, 408, 179 N.E.2d 497, 500, 501, 223 N.Y.S.2d 488, 492, 494 (1961) (Van Voorhis, J., dissenting); C. MCCORMICK, DAMAGES 276 (1935); Note, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173, 1176-83 (1931). Several reasons are advanced for this view, including the possibility of subjecting a defendant to double punishment in the form of criminal and civil penalties, the fact that it is in the jury's discretion whether to give an award, and the imprecise standards which sometimes result in excessive judgments. Walker v. Sheldon, 10 N.Y.2d 401, 406, 408, 179 N.E.2d 497, 500, 501, 223 N.Y.S.2d 488, 492, 494 (1961) (Van Voorhis, J., dissenting) (citing C. MCCORMICK, DAMAGES 276 (1935)).

[245] 61 App. Div. 2d at 495, 402 N.Y.S.2d at 817.

While accountability in damages may deter, to some extent, aggressive pursuit of newsworthy stories,[247] courts have refused to accord the press special privileges to shield them from liability for tortious conduct committed in the course of news gathering.[248] Thus, there appears to be nothing unusual in holding CBS liable in compensatory damages for trespass. Furthermore, while the appellate division's holding that the press can be liable for punitive damages is novel,[249] it appears to be conceptually sound.[250]

In its haste to serve notice that punitive damages are assessable for trespasses committed by news gatherers, however, the court seems to have expanded the availability of such damages in all trespass actions. While New York has long recognized that punitive damages may be recovered in trespass actions,[251] those incidents of

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[246] *Id.* at 495, 402 N.Y.S.2d at 818. Justice Murphy dissented, reasoning that the defendant's "overly aggressive but good faith" pursuit of news did not warrant a punitive damages award. *Id.* at 496, 402 N.Y.S.2d at 818 (Murphy, P.J., dissenting in part).

[247] In the context of a defamation action, Justice Black noted that "[t]he half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 294 (1964) (Black & Douglas, JJ., concurring). The fear of damage awards in the news-gathering context may similarly inhibit the press in their pursuit of newsworthy stories. *See* 61 App. Div. 2d 491, 496, 402 N.Y.S.2d 815, 818 (1st Dep't 1978) (Murphy, P.J., dissenting in part). *See also* Galella v. Onassis, 487 F.2d 986, 998 (2d Cir. 1973), wherein injunctive relief was tailored narrowly so as not to unnecessarily inhibit the photographer's "reasonable effors [sic] to 'cover' defendant." *Id.*

[248] *See* note 229 *supra.* Although recognizing the extensive privileges accorded the press under the first amendment, the Supreme Court has stated: "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Branzburg v. Hayes, 408 U.S. 665, 682 (1972). In a recent decision, Hudgens v. NLRB, 424 U.S. 507 (1976), the Supreme Court has upheld the right of the owner of a private, open-to-the-public shopping center to exclude speakers and pamphleteers from his property. Viewing the shopping center as private property open to the public for a particular purpose, and recognizing that the first amendment only guards against governmental invasions of free speech rights, the Court upheld the right of the owner to remove trespassers from his property. *Id.* at 512-21; *accord,* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). Similarly, in *Le Mistral,* the plaintiff's property was open to the general public for purposes of dining. Based on *Hudgens* and *Lloyd,* CBS' trespass into the restaurant for purposes of collecting news arguably was not protected by the first amendment.

[249] Presiding Justice Murphy noted that "[t]o the date of this opinion, it may be safely said that the news media has rarely been taken to task for the type of unwarranted intrusion presented in this proceeding." 61 App. Div. 2d at 496, 402 N.Y.S.2d at 818 (Murphy, P.J., dissenting in part). *But see* Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975), *discussed in* note 229 *supra,* wherein punitive damages were awarded against a reporter for defamatory statements made in the course of gathering news.

[250] *See* note 229 *supra;* note 251 & accompanying text *infra.*

[251] *E.g.,* Sheldon v. Baumann, 19 App. Div. 61, 45 N.Y.S. 1016 (1st Dep't 1897); Steenburgh v. McRorie, 60 Misc. 510, 113 N.Y.S. 1118 (Otsego County Ct. 1908). To recover punitive damages for trespass, the plaintiff has the burden of proving that the defendant

trespass that have resulted in punitive damage awards have generally been accompanied by threats, violence or repeated intrusions on the plaintiff's property.[252] Although this type of conduct was absent in *Le Mistral,* the appellate division held that punitive damages could properly be awarded. While it is uncertain whether the courts will be as willing to approve punitive damage awards in trespass actions generally, it is clear that where attempts by the news media to obtain information infringe on the rights of others, liability and large punitive damage awards may result.

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Prima facie tort action upheld despite absence of special damages and specific intent to harm

Under the prima facie tort doctrine, a wrong which does not fall within a traditional tort category may nevertheless be actionable if the wrongdoer, without just cause or excuse,[253] has wilfully and intentionally caused injury.[254] As the doctrine has evolved in New

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acted with "actual malice," or that the defendant's conduct evinced a "wanton and willful or reckless disregard of plaintiff's rights." MacKennan v. Jay Bern Realty Co., 30 App. Div. 2d 679, 679, 291 N.Y.S.2d 953, 954 (2d Dep't 1968); *see* Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1388-89 (5th Cir. 1977); Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

Although not explicitly required by the standard, a showing of violent acts or repeated intrusions has been necessary for the plaintiff to satisfy his burden of proof. *See* note 252 & accompanying text *infra.*

[252] *See* Wort v. Jenkins, 14 Johns. 352 (1817) (per curiam); Smalling v. Jackson, 133 App. Div. 382, 117 N.Y.S. 268 (2d Dep't 1909); Sheldon v. Baumann, 19 App. Div. 61, 45 N.Y.S. 1016 (1st Dep't 1897); DaCosta v. Technico Constr. Corp., 74 Misc. 2d 583, 344 N.Y.S.2d 967 (N.Y.C. Civ. Ct. N.Y. County 1973), *aff'd per curiam,* 78 Misc. 2d 1100, 360 N.Y.S.2d 846 (Sup. Ct. App. T. 1st Dep't 1974); Norton v. Glicksman, 9 Misc. 2d 985, 174 N.Y.S.2d 12 (Sup. Ct. Nassau County 1957); Tifft v. Culver, 3 Hill 180 (Sup. Ct. Utica County 1842); Steenburgh v. McRorie, 60 Misc. 510, 113 N.Y.S. 1118 (Otsego County Ct. 1908).

[253] Any excuse or justification, including profit motive or business justification, is sufficient in New York to negate evidence of actual malice. *See, e.g.,* Squire Records, Inc. v. Vanguard Recording Soc. Inc., 25 App. Div. 2d 190, 268 N.Y.S.2d 251 (1st Dep't 1966) (per curiam), *aff'd mem.,* 19 N.Y.2d 797, 226 N.E.2d 542, 279 N.Y.S.2d 737 (1967); note 255 *infra.* Hecht v. Air Reduction Co., 41 Misc. 2d 463, 245 N.Y.S.2d 935 (Sup. Ct. Queens County 1963).

[254] Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956); Brandt v. Winchell, 283 App. Div. 338. 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954), *aff'd,* 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958). Traditional tort law has been criticized by one noted commentator as "a set of pigeonholes, each bearing a name, into which the act or omission of the defendant must be fitted before the law will take cognizance of it and afford a remedy." W. PROSSER, LAW OF TORTS § 1 (4th ed. 1971). In response to this inherent rigidity, the courts developed the prima facie tort doctrine as a means of providing redress in instances where harm is intentionally and